

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOSE ROBERTO FERNANDEZ- RUIZ,	Petitioner,
v.	
JOHN ASHCROFT, Attorney General,	Respondent.

No. 03-74533

Appeal from the United States
Department of Justice
Executive Office for
Immigration Review
Board of Immigration Appeals
No. A90-116-400

**PETITIONER JOSE ROBERTO FERNANDEZ-RUIZ'S
PETITION FOR REHEARING
(REQUEST FOR REHEARING EN BANC)**

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INTRODUCTION

Petitioner Jose Roberto Fernandez-Ruiz hereby respectfully requests rehearing in the above-captioned matter. This Petition for Rehearing is limited to the Court's ruling that Petitioner's conviction under A.R.S. §§ 13-1203 constitutes a crime of violence under 18 U.S.C. § 16, and therefore a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i).

Rehearing is warranted because the Panel's ruling on the foregoing issue is in conflict with the decision of another panel of this Court, *Lara-Cazares v. Gonzales*, No. 03-71568, 2005 U.S. App. LEXIS 9349 (May 23, 2005), and the conflict was not addressed in the Panel's decision. The Court in the present matter relied on *United States v. Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000), to hold that Petitioner's conviction under A.R.S. § 13-1203 was a crime of violence. Another panel of this Court, in *Lara-Cazares*, held that the rule of law in *Ceron-Sanchez* relied on by this Panel is no longer good law. Under *Lara-Cazares*, Petitioner's conviction under A.R.S. § 13-1203 does not involve the "use" of force and therefore does not qualify as a crime of violence under 18 U.S.C. § 16, in direct conflict with this Panel's decision. Rehearing is appropriate to resolve this conflict.

Pursuant to Rule 35(b)(1)(A), Fed.R.App.P., Petitioner requests rehearing *en banc*. Consideration of this matter by the full court is necessary to secure and maintain the uniformity of the Court's decisions and resolve the conflict between the Court's holding in this matter and its holding in *Lara-Cazares*.

ARGUMENT

I. The Panel's Holding.

The Panel in this matter found Petitioner removable under 8 U.S.C. § 1227(a)(2)(E)(i), for having committed a crime of domestic violence, because:

Fernandez-Ruiz was convicted under Ariz.Rev.Stat. §§ 13-1203 and 13-3602 for a Class 2 misdemeanor domestic violence assault. Because he plead guilty to a Class 2 misdemeanor, Fernandez-Ruiz must necessarily have been convicted of violating either Ariz.Rev.Stat. §§ 13-1203(A)(1) or (2). *See* Ariz.Rev.Stat. § 13-1203(B). Both of these sub-sections require “the use, attempted use or threatened use of physical force against the person or property of another,” and thus are crimes of violence under 18 U.S.C. § 16(a). *See United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir. 2000).

II. The Statutes at Issue: 8 U.S.C. § 1227(a)(2)(E)(i), 18 U.S.C. § 16, and A.R.S. § 13-1203.

8 U.S.C. § 1227(a)(2)(E)(i) defines a crime of domestic violence as “any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by... an individual who is cohabiting with or has cohabited with the person as a spouse....”

18 U.S.C. § 16 in turn defines a crime of violence as

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

A.R.S. § 13-1203, the statute under which Petitioner was convicted, states, in relevant part, that a person commits assault by either (1) intentionally, knowingly or recklessly causing physical injury to another person or (2) intentionally placing another person in reasonable apprehension of imminent physical injury. A.R.S. § 13-1203(A). Subsection (B) specifies that assault committed intentionally or knowingly pursuant to Subsection A, paragraph 1 is a class 1 misdemeanor and assault committed recklessly pursuant to subsection A, Paragraph 1 or pursuant to subsection A paragraph 2 is a class 2 misdemeanor. A.R.S. § 13-1203(B).

Because Petitioner was convicted of a class 2 misdemeanor, his conviction was either for recklessly causing physical injury to another person or intentionally placing another person in reasonable apprehension of imminent physical injury. Under well-established law, if either of these offenses does not qualify as a crime of violence, Petitioner's conviction is not for a crime of domestic violence and cannot be used as a basis for removal. *In re Marchena*, 12 I&N Dec. 355, 357 (BIA 1976) (holding that if it is not clear which offense under a statute the alien committed, the Court must look to the minimum offense of which the alien could have been convicted under the statute and determine if that minimum offense fits the definition of the predicate offense).

III. The Holding of *Lara-Cazares*.

Contrary to the finding of this Panel, under the Court's decision in *Lara-Cazares*, 2005 U.S. App. LEXIS 9349, Petitioner's conviction under A.R.S. § 13-1203(A)(1) was not for a crime of violence, because it does not necessarily involve the "use, attempted use or threatened use of physical force against another."

Lara-Cazares was ordered removed from the United States under 8 U.S.C. § 1101(a)(43)(F), for having been convicted of an aggravated felony--crime of

violence. Lara-Cazares was convicted of gross vehicular manslaughter while intoxicated under California law, which required as elements, *inter alia*, killing of another with gross negligence. On appeal of his removal order, the Court determined that the Supreme Court's analysis in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), established that Lara-Cazares's conviction did not qualify as a crime of violence, because a conviction predicated on gross negligence did not involve a "use" of force as required under 18 U.S.C. § 16.

Specifically, the Court stated that "under the Supreme Court's reasoning in *Leocal*, Lara-Cazares simply cannot be regarded as having used physical force against the person of another. He did not actively employ force against another in a manner to constitute a crime of violence under § 16." *Lara-Cazares*, 2005 U.S. App. LEXIS 9349 at *8.

In reaching its conclusion, the *Lara-Cazares* Court relied on, and quoted from, *Leocal*:

The critical aspect of § 16(a)¹ is that a crime of violence is one involving the use... of physical force *against the person or property of another*.... [U]se requires active employment. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use...physical force against" another when pushing him; however, we would not ordinarily say that a person "use[s]...physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their ordinary or natural meaning. The key phrase in § 16(a)—the "use... of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

¹ Because Petitioner's conviction under A.R.S. § 13-1203 was a class 2 misdemeanor, 18 U.S.C. 16(b) is inapplicable.

Lara-Cazares, 2005 U.S. App. LEXIS 9349 at *6 (quoting *Leocal*, 125 S. Ct. at 382) (omissions and emphasis in original).

Furthermore, the *Lara-Cazares* Court stated that although *Leocal* addressed simple negligence, rather than gross negligence, the Supreme Court's reasoning applied equally to convictions involving gross negligence. As the Court stated, "gross negligence is still negligence, however flagrant, and does not constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence." *Id.* at **8-9 (emphasis in original).

IV. The *Lara-Cazares* Holding Overruled *Ceron-Sanchez*.

Significantly, for purposes of this petition, the *Lara-Cazares* court concluded that "to the extent our decision in *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001), and cases there cited support a contrary result, we conclude they are no longer good law in light of *Leocal*." *Id.* at *12.

Park, in relevant part, relied almost exclusively on *Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000), to find that a reckless *mens rea* was sufficient to establish a "use" of force under § 16(a) and (b). Indeed, although the *Park* Court recognized that three other circuits required the intentional use of physical force to constitute a crime of violence, it stated that the issue had already been decided in this circuit by *Ceron-Sanchez*, and therefore was "not an open question." The *Park* Court based its decision on the holding in *Ceron-Sanchez* that a conviction under A.R.S. § 13-1203(A)(1) based on reckless conduct was a crime of violence, because reckless action constituted the "use" of physical force. *Ceron-Sanchez*, 222 F.3d at 1173.

In holding that "*Park v. INS*, 252 F.3d 1018 (9th Cir. 2001), and cases there cited", *Lara-Cazares*, 2005 App. LEXIS 9349 at *12 (emphasis added), are no longer good law, *Lara-Cazares* establishes that the portion of *Ceron-Sanchez*

relied on by this Panel is no longer good law, and that this Panel's continued reliance on the rule of law as stated in *Ceron-Sanchez* was in error.

V. **Petitioner's Conviction under A.R.S. § 13-1203 Was not for a Crime of Violence under *Lara-Cazares*.**

Both the holding of, and reasoning in, *Lara-Cazares* directly conflict with the Panel's holding in the present matter that Petitioner's conviction under A.R.S. § 13-1203 constitutes a crime of domestic violence. Under *Lara-Cazares*, 2005 App. LEXIS 9349, Petitioner's conviction was not for a crime of violence, because it did not require the "use" of physical force against another. Under Arizona law, gross negligence and recklessness are the same *mens rea*. See, e.g., *K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 266, 941 P.2d 1288, 1291 (App. 1997); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986); *Williams v. Wise*, 106 Ariz. 335, 340-41, 476 P.2d 145, 150-51 (1970) ("the Restatement of Torts, Second, [] uses the term "reckless misconduct" to refer to the same type of conduct which we have denominated above as "gross and wanton negligence."); *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (willful, wanton, and reckless conduct is commonly grouped together as an aggravated form of negligence).

Lara-Cazares held that gross negligence, and therefore recklessness under Arizona law, "does not constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence." *Lara-Cazares*, 2005 App. LEXIS 9349 at **8-9 (emphasis in original). Under *Lara-Cazares*, therefore, Petitioner's conviction, having been for reckless conduct, does not require the "use" of force against another and is not a crime of violence under 18 U.S.C. § 16. Accordingly, under *Lara-Cazares*, Petitioner's 2003 conviction under A.R.S. § 13-

1203 was not for a crime of domestic violence, and Petitioner is not removable on those grounds.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the Court grant Petitioner rehearing *en banc* to resolve the apparent conflict between the decision of this Panel and the Court's decision in *Lara-Cazares*, 2005 App. LEXIS 9349. Petitioner further requests that, in light of the decision in *Lara-Cazares*, the Court reverse the decision of the Panel and find that Petitioner's conviction under A.R.S. § 13-1203 does not constitute a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i).

RESPECTFULLY SUBMITTED this 21 st day of June, 2005.

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To: Panel and all active judges and any interested senior judges

Re: Brief for Respondent in opposition to petition for rehearing

03-74533

Fernandez-Ruiz v. Gonzales

Opinion dated May 31, 2005

Panel Judges: Honorable Stephen R. REINHARDT, Circuit Judge

 Honorable John T. NOONAN, Senior Circuit Judge

 Honorable Ferdinand F. FERNANDEZ, Senior Circuit Judge

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INTRODUCTION

The petition does not meet the criteria for rehearing *en banc*. The panel's decision is consistent with the Supreme Court's decision in Leocal v. Ashcroft, *infra*, and with this Court's decision in Lara-Cazarez v. Gonzales, *infra*. Both of those decisions concern whether a criminal offense that entails negligent conduct may constitute a crime of violence under 8 U.S.C. § 16. They do not address whether an offense that encompasses recklessness, which arises in this case, may be a crime of violence.

The Arizona criminal code, as well as the precedent of this Court, make clear that recklessness involves a greater degree of criminal intent than gross negligence. With the exception of the Third Circuit's recent decision in Popal v. Gonzales, *infra*, no court of appeals of which we are aware has held that a conviction of an assault offense such as Petitioner's is not categorically a crime of violence under 8 U.S.C. §16(a).

STATEMENT

Mr. Fernandez-Ruiz is a native and citizen of Mexico. He was admitted to the United States as a lawful permanent resident in 1990. He accumulated several criminal convictions in the United States, including: 1) endangerment in July 1991, in violation of Ariz. Rev. Stat. ("ARS") § 12-1201 (Administrative Record ("A.R.") 45); 2) theft by control of property in April 1992, in violation of ARS

§13-1802(A)(1) (A.R. 38-41); 3) probation violation in Arizona in June 1994 (A.R. 31-32); 4) domestic violence assault in October 2002, in violation of ARS §§ 13-1203¹ and 13-3601² (A.R. 28); 5) domestic violence assault in Arizona in January 2003, in violation of ARS §§ 13-1203 and 13-3601 (A.R. 24); 6) driving under the influence of alcohol in Arizona in April 2003; and 7) assault in Arizona in May 2003, in violation of ARS § 13-1203. A.R. 18.

The former Immigration and Naturalization Service ("INS") initiated removal proceedings. On December 3, 2003, the Board of Immigration Appeals ("Board") sustained the INS's three charges of removability, holding that Mr. Fernandez-Ruiz's 1992 theft offense was an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43)(G); that his 2003 domestic assault offense was a "crime of domestic violence" as defined under 8 U.S.C. § 1227(a)(2)(E)(i); and that the 2002 and 2003 domestic violence offenses were crimes involving moral turpitude, rendering him deportable under 8 U.S.C. § 1227(a)(2)(A)(ii). A.R. 9-10.

¹ ARS § 13-1203(A)(1) states, in relevant part: "A person commits assault by . . . Intentionally, knowingly, or recklessly causing any physical injury to another person."

² ARS § 13-3601 defines "domestic violence" as "any act which is . . . an offense defined in § 13-1201 through 13-1204 . . . , if . . . [t]he relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household."

A panel of this Court affirmed the Board's decision. Fernandez-Ruiz v. Gonzales, 410 F.3d 585 (9th Cir. 2005). The Court agreed with the Board that Petitioner's 2003 domestic assault conviction was a "crime of domestic violence" as defined under 8 U.S.C. § 1227(a)(2)(E)(i). 410 F.3d at 588 (citing United States v. Ceron-Sanchez, 222 F.3d 1169, 1172 (9th Cir. 2000)). Because this conviction occurred after the 1996 repeal of former INA section 212(c), 8 U.S.C. § 1182(c) (1994), he was ineligible for discretionary relief under section 212(c). 410 F.3d at 588. In addition, the Court held that Petitioner's 1994 theft offense was an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(G). 410 F.3d at 588. Because of his aggravated felony offense, Petitioner was statutorily ineligible for cancellation of removal. Id. (citing 8 U.S.C. § 1229b(a)(3)).

ARGUMENT

I. **The Panel's Decision Does Not Conflict With Leocal v. Ashcroft Or Any Decision Of This Court**

The panel's decision does not conflict with the Supreme Court's decision in Leocal v. Ashcroft, — U.S. —, 125 S. Ct. 377 (2004). Leocal holds that a conviction under a Florida statute for driving under the influence and causing serious bodily injury is not a crime of violence under 18 U.S.C. § 16(a). The Court reasoned that the critical point in determining a crime of violence under section 16(a) is not whether the word "use" contains a particular *mens rea* element,

but that the statute requires the "use . . . of physical force *against the person or property of another.*" 125 S. Ct. at 382 (quoting statute and adding emphasis).

The Court reasoned that this language "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Id. Accordingly, the case did not present the question whether "a federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." Id. at 384 (emphasis in original). Mr. Fernandez-Ruiz was convicted of class two misdemeanor assault under ARS § 13-1203, which includes as an element recklessly causing any physical injury to another person. Because he was not convicted of an offense with a *mens rea* of less than recklessness, the panel's decision is not contrary to Leocal.

The panel's decision is also fully consistent with this Court's decision in Lara-Cazarez v. Gonzales, 408 F.3d 1217 (9th Cir. 2005). The Court held there that a conviction under California's gross vehicular manslaughter statute, Cal. P. C. § 191.5(a) is not a crime of violence under section 16(a). In making this determination, the Court noted that the requirement of gross negligence, in the context of § 191.5(a), could be satisfied by, among other things, the level of the defendant's intoxication, a factor that is "not necessarily directed at an intent in use of force against another person." Id. at 1221 n.5. The Court observed that "[g]ross negligence is still negligence, however flagrant, and does not constitute

the kind of *active* employment of force against another that Leocal requires for a crime of violence.” 408 F.3d at 1221. While the offense required that the defendant have killed a person with gross negligence, “[t]here is no requirement that he intentionally used the vehicle to inflict injury.” Id. at 1221. To the extent that the Court’s previous decision in Park v. INS, 252 F.3d 1018 (9th Cir. 2001), and cases cited therein, supported a contrary result, the Court held that they “were no longer good law in light of Leocal.” Id. at 1222.

Mr. Fernandez-Ruiz urges rehearing based on Lara-Cazarez, asserting that, “under Arizona law, gross negligence and recklessness are the same *mens rea*.” Petition For Rehearing at 6. Likewise, *Amici* state that “ARS § 13-1203(A)(1) can be violated through recklessness, the same mental state as the gross negligence underlying petitioner’s conviction in Lara-Cazarez.” Brief Of *Amici Curiae* at 6.

Petitioner and *Amici* are mistaken in their belief that recklessness and gross negligence are interchangeable. The Arizona statute governing culpability states, in relevant part:

If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element is also established if a person acts intentionally or knowingly.”

ARS § 13-202(C). In permitting criminal negligence to be established by a showing of recklessness, but not the reverse, Arizona clearly requires a higher degree of culpability for recklessness than for criminal negligence. This Court has confirmed that reckless conduct entails a higher level of criminal intent than negligence: "The confusion between general and specific intent has been the catalyst for a movement to replace these categories with a hierarchy of four levels of culpable states of mind . . . purpose, knowledge, recklessness, and negligence." United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1197 (9th Cir. 2000), cert. denied, 535 U.S. 1069 (2002).

The authorities cited by Petitioner and *Amici* do not support their assertion that gross negligence is the same as recklessness. Mr. Fernandez-Ruiz relies exclusively on civil tort cases,³ which have no bearing on scienter requirements of

³ See Petition at 6 (citing K.B. v. State Farm Fire and Casualty Co., 189 Ariz. 263, 266, 941 P.2d 1288, 1291 (Ariz. 1997) (civil case holding that recklessness is the minimally sufficient mental state for aggravated assault; Linthicum v. Nationwide Life Insurance Co., 150 Ariz. 326, 330, 723 P.2d 675, 679 (Ariz. 1986) (civil case holding that gross negligence can allow recovery for punitive damages in tort action); Williams v. Wise, 106 Ariz. 335, 340-41, 476 P.2d 145, 150-51 (Ariz. 1970) (holding in civil tort case that jury instruction should distinguish between ordinary negligence and "gross and wanton negligence," which may include "reckless misconduct."); Williams v. Thude, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (holding in civil case that for purposes of determining contributory negligence, "willful, wanton, and reckless conduct have commonly been grouped together as an aggravated form of negligence") (internal quotation omitted).

criminal law. See United States v. McInnis, 976 F.2d 1226, 1232 (9th Cir. 1992) (holding that principles of tort law are irrelevant as to whether a state offense meets the definition of a federal criminal statute). Similarly unhelpful is *Amici*'s citation to footnote 5 of Lara-Cazarez. *Amici* at 6. The Court stated there that a criminal jury may find gross negligence under Cal. P. C. § 191.5 based on the level of the defendant's intoxication. 408 F.3d at 1221 n.5. The Court did not state or suggest that a finding of gross negligence is sufficient to establish recklessness. Indeed, in the very next footnote, the Court noted that the Leocal Court "was not presented with a statute requiring 'the *reckless* use of force against the person or property of another.'" 408 F.3d at 1221 n.6 (quoting Leocal, 125 S. Ct. at 384) (emphasis in Leocal).

Amici also rely on Park v. INS, *supra*, which was invalidated partially by Lara-Cazarez. *Amici* at 6-7. Park held that a conviction in California of involuntary manslaughter was a crime of violence under section 16(b), because the *mens rea* for the offense was "no less culpable than recklessness under Arizona law." Park, 252 F.3d at 1024-25. The Lara-Cazarez Court held that Park and cases cited therein were not good law to the extent that they hold that *negligence* is sufficient to establish a crime of violence. 408 F.3d at 1222. Lara-Cazarez does not hold that *recklessness* cannot satisfy the definition of a crime of violence. See

Lara-Cazarez, 408 F.3d at n.6 (stating that its decision pertained only to "negligence in drunken driving").

Nor, for similar reasons, did Lara-Cazarez "overrule" Ceron-Sanchez. Petition at 5-6; *Amici* at 7. Park relied on Ceron-Sanchez for the proposition that a *reckless* state of mind is sufficient to establish a crime of violence under both section 16(a) and 16(b). 252 F.3d at 1024 (citing Ceron-Sanchez, 222 F.3d at 1172-73). Park did not invoke Ceron-Sanchez as authority that *negligence* was sufficient to establish a crime of violence. Because Lara-Cazarez addressed only criminal negligence and not recklessness, its holding has no impact on the viability of Ceron-Sanchez.

Indeed, the Court recently reaffirmed — after Lara-Cazarez — Ceron-Sanchez's holding that recklessness is a sufficient *mens rea* to establish a crime of violence. In United States v. Hermoso-Garcia, — F.3d —, 2005 WL 1579507 (9th Cir. July 7, 2005), the defendant was convicted of second degree assault in Washington, a statute substantially identical to ARS §13-1203. The Court held that this offense was categorically a crime of violence under § 2L1.2(b)(a)(A)(ii) of the Federal Sentencing Guidelines, which, like 8 U.S.C. §16, encompass "any offense under . . . state . . . law that has as an element the use . . . of physical force against the person of another." The Court reasoned that the assault offense satisfied the "use of force" requirement, because the defendant must have

"recklessly inflict[ed] substantial bodily harm" upon another person, and thus "must be the proximate cause of serious bodily injury to another and must act with at least a reckless mental state." 2005 WL 1579507 at *2 (quoting United States v. Grajeda-Ramirez, 348 F.3d 1123, 1125 (9th Cir. 2003)). The holding of Hermoso-Garcia confirms that the panel's decision here is fully consistent with Lara-Cazarez and the Court's other precedents.

II. The Panel's Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals, Except Possibly The Third Circuit

Mr. Fernandez-Ruiz does not contend that the Court's decision conflicts with the decision of any other court of appeals. *Amici* claim an inter-circuit conflict with four cases, three of which involve offenses of vehicular assault while intoxicated. *Amici* at 7-11. The vehicle/intoxication cases are inapposite, as those offenses do not entail levels of criminal intent as high as the Arizona assault statute. See United States v. Vargas-Duran, 356 F.3d 598, 602 (5th Cir. 2004) (*en banc*) (holding that conviction under Texas statute under which a person causes serious bodily injury to another "by accident or mistake, while operating a . . . motor vehicle . . . while intoxicated" is not a crime of violence); United States v. Rutherford, 54 F.3d 370, 373 (7th Cir. 1995) ("no avilment of force in order to achieve an end is present in a drunk driving accident').

The Supreme Court made clear in Leocal that driving while intoxicated offenses are different than other crimes for purposes of a § 16 analysis. "In no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." 125 S. Ct. at 383. A drunk driver is not normally understood to have a conscious awareness that he is using the vehicle while impaired to use force against persons or property. See United States v. Torres-Ruiz, 387 F.3d 1179, 1187 (10th Cir. 2004) ("a drunk driver typically does not mean to cause an accident at all, and can hardly be said to 'commit' the resulting violence" (quoting United States v. Lucio-Lucio, 347 F.3d 1202, 1205-06 (10th Cir. 2003))). However, a reckless assaulter will necessarily have general knowledge that he is using force against another person. See ARS § 13-105 (defining "reckless" as when a person "is aware of and consciously disregards a substantial and unjustifiable risk *that the* [proscribed] *result will occur*" (Emphasis added)). The higher level of culpability associated with non-intoxication-related offenses makes the vehicle/intoxication offenses of little guidance here.

Arguably, the Third Circuit's recent decision in Popal v. Gonzales, — F.3d —, 2005 WL 1791998 (3d Cir. 2005) is contrary to the panel's holding. The defendant in that case was convicted of simple assault under 18 Pa. Cons. Stat. § 2701(a), for having shot another person with a compressed air pistol. 2005 WL

1791998 at *3 - *5. In reversing the government's charge of removability, the Court held that the statute's minimum culpability of recklessness required for conviction was not sufficient to establish an intent to "use" force against a person or property under § 16. Id. (citing Tran v. Gonzales, — F.3d —, 2005 WL 1620320 (3d Cir. July 12, 2005)). The Pennsylvania simple assault statute is substantially similar to ARS § 1203.

The Popal decision is incorrect. Recklessly discharging a firearm where persons are present evidences a general intent to "use" physical force against another, even if specific intent is not present. See United States v. Bonilla-Montenegro, 331 F.3d 1047, 1051 (9th Cir. 2003) (holding that conviction of voluntary manslaughter in California was a crime of violence under the sentencing guidelines, because the general intent of recklessness is a sufficient *mens rea*); United States v. Springfield, 829 F.2d 860, 863 n.1 (9th Cir. 1987) ("The legislative history of [18 U.S.C. § 924(e)(2)(B)]⁴ indicates that Congress did not intend to limit 'crimes of violence' to crimes of specific intent . . ."). Indeed, the Popal Court acknowledged that the legislative history of § 16(a) indicates that Congress intended to include within its coverage "a threatened or attempted

⁴ 18 U.S.C. § 924(e)(2)(B) defines "violent felony" as a crime punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of force against the person of another."

simple assault or battery on another person," contrary to the Third Circuit's holding. 2005 WL 1791998 at *4 n.5 (citing S. Rep. No. 98-225, at 307 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3487). Because the Popal decision is incorrect and the panel's decision is correct, rehearing would serve no purpose in resolving any inter-circuit conflict with Popal.

III. *Amici's* Alternative Argument Is Without Merit And Is Not Properly Before The Court

Amici assert in the alternative that the Court should take the case *en banc* in order to "overrule Ceron-Sanchez." *Amici* at 11-12. They maintain that Ceron-Sanchez is inconsistent with Singh v. Ashcroft, 386 F.3d 1228 (9th Cir. 2004), because the Arizona assault statute could encompass offenses that do not involve the active use of force. *Amici* at 11-17. In *Amici's* view, killing or injuring another person by indirect means such as poisoning is not a crime of violence, because the perpetrator did not apply force directly to the victim. *Id.* at 13. While this view has been accepted by some courts, it is flawed and should be rejected. As stated in the dissenting opinion in United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (*en banc*):

[T]he "use of physical force" . . . under the crime-of-violence guideline should extend to cover those applications of force that are subtle and indirect, rather than only those embracing "bodily contact." This is a matter of common sense. If someone lures a poor swimmer into waters with a strong undertow in order that

he drown, or tricks a victim into walking toward a high precipice so that he might fall . . . the perpetrator has at least attempted to make use of physical force against the person of the target, either through the action of water to cause asphyxiation or by impact of earth on flesh and bone.

383 F.3d at 270 (Barksdale, J, dissenting).

Assuming *arguendo* that a person could be convicted under ARS § 13-1203(A)(1) without "using" physical force under § 16(a), that would not preclude a showing that Mr. Fernandez-Ruiz's offense contained as an element the use of force, through reference to the conviction records under the "modified categorical" approach of Taylor v. United States, 495 U.S. 575 (1990). See, e.g., United States v. Coleman, 158 F.3d 199, 202 (4th Cir. 1998) (en banc) (permitting examination of underlying records where "an offense could have been committed in two ways, one of which required a finding that physical force was used and the other of which did not"). Here, it was not necessary for the agency to undertake any modified categorical analysis because Mr. Fernandez-Ruiz did not assert to the agency that his domestic violence offense was not a crime of violence. See A.R. 65-74. Because there has been no factual or legal development of this issue, the Court should decline to address it on rehearing.

Amici also assert that ARS § 13-1203(A)(1) may be violated by committing a DUI offense that causes injury, and that the Supreme Court held in Leocal that "a

DUI conviction does not require the 'use' of force against another person." *Amici* at 13. The Supreme Court did not hold in Leocal, however, that a DUI offense can never involve the use of force. The Court's decision was limited to negligent DUI offenses and did not reach the reckless conduct that would be required under ARS § 13-1203(A)(1). 125 S. Ct. at 384. Accordingly, the Arizona DUI/assault cases cited by *Amici* are inapposite.

Amici's claim of an intra-circuit conflict with Singh is illusory. Singh holds that the Oregon offense of harassment, which makes it a crime to directly or indirectly contact another person with intent to harass or annoy, is not categorically a crime of violence under § 16(a). 386 F.3d at 1232. The Court reasoned that "the Oregon harassment statute will routinely embrace within its prohibition, if the intent to harass is shown, an offensive touching *that is not aimed at creating physical injury.*" Id. at 1233 (emphasis added). By contrast, the Arizona assault statute here requires a showing of reckless action that *causes physical injury.* ARS 13-1203(A)(1). The Oregon and Arizona statutes are not only different, they are diametrically opposed. Consequently, the panel's holding that Petitioner's assault offense *is* a crime of violence is fully consistent with, if not compelled by, Singh.

IV. Rehearing Of The Crime Of Violence Issue Would Be Pointless, Due To Petitioner's Aggravated Felony Conviction

Rehearing of the issue raised in the Petition would be superfluous in any event. Mr. Fernandez-Ruiz does not dispute that he is removable as an aggravated felon, based on his 1994 theft conviction. See Petition for Rehearing at 1 ("This Petition for Rehearing is limited to the Court's ruling that Petitioner's conviction under ARS §§ 13-1203 constitutes a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i)."). Because of his aggravated felony conviction, Petitioner is statutorily ineligible for relief from removal, and is permanently barred from readmission to the United States. See 8 U.S.C. § 1182(a)(9)(A)(i).

Accordingly, even if the Court were to grant rehearing and reverse the Board's finding of a crime of domestic violence, it would make no difference in the outcome of this case. It would mean only that Petitioner is removable on two statutory grounds and not three. The Court should decline to expend its rehearing resources on what is an essentially meaningless point to this Petitioner.

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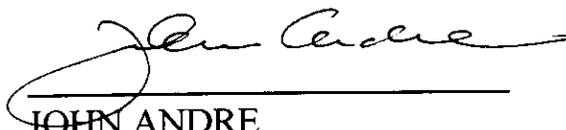
CONCLUSION

The petition for rehearing should be denied.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "John Andre", is written over a horizontal line.

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